IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

CARL L. HARDEN PLAINTIFF

VS. CIVIL NO. 4:97CV228-JAD

FRANK A. CARLTON, JR., ETC. DEFENDANT

MEMORANDUM OPINION

Defendant has filed a motion to dismiss for failure to cooperate in discovery and a motion for summary judgment. After review of the court file and the briefs of the parties, the court concludes that the motion to dismiss should be **denied** but the motion for summary judgment should be **granted**.

Motion to dismiss for failure to cooperate in discovery.

The motion to dismiss arises out of a last minute motion to quash his deposition filed by the plaintiff on the date his deposition was scheduled to take place. After an earlier flurry of motions, the court on September 30, 1998, directed the parties to schedule plaintiff's deposition on or before October 16. On October 9, 1998, the defendant faxed to the plaintiff a subpoena scheduling his deposition for 10:30 a.m. October 14, 1998. Formal service was had on plaintiff on October 12. On the morning of the October 14 plaintiff filed a motion to quash the subpoena. That motion was handled by telephone between court personnel and the plaintiff, and plaintiff was instructed to appear at the deposition as scheduled. Plaintiff arrived at the place of the deposition approximately 45 minutes late, and the defendant had departed.

A subpoena is not necessary to notify a party of a deposition or to compel his attendance. Harden had five days notice of the deposition, but waited until the morning it was scheduled to

protest the timing. This is inexcusable, and if this sort of action were taken by an attorney, the case would be dismissed without hesitation. However, Harden is proceeding *pro se*, and while that does not excuse his dilatory response to the faxed notice of deposition, some leniency will be given, as he did respond to the court's directive that he appear, albeit late, for the deposition. The motion to dismiss for failure to cooperate in discovery will be **denied**.

Motion for summary judgment.

The facts giving rise to this case are as follows: Plaintiff was hired on July 1, 1994, as an investigator in the office of Frank Carlton, District Attorney for the Fourth District. On or about December 3, 1996, a dispute arose between Harden, a black male, and Ms. Gracie Morlino, a white female employee in that office, regarding some instructions she had given a caller for Harden. Harden confronted Morlino, and a shouting match started and ended with the plaintiff placing his hands on Morlino's throat, he says to hold her off from attacking him. This altercation was in plain view and hearing of other employees. Both Morlino and Harden filed assault charges against the other, although apparently no adjudication ever resulted from either charge.

Both employees were immediately placed on administrative leave with pay. Morlino submitted her resignation on December 3, and Harden, refusing resignation, was terminated the last week in December. Sandra Reed, a white female and former employee, was hired to assume Morlino's duties, but could not begin work until March 1, 1997. Morlino was asked to remain at her post until Reed came on duty. Morlino trained Reed for approximately eight weeks when Morlino was involved in a serious automobile accident. She used her accrued leave time and medical benefits to remain on the payroll until July 1, 1997. She then worked for the remainder

of the month and terminated her employment on July 31, 1997.

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). The burden rests upon the party seeking summary judgment to show to the district court that an absence of evidence exists in the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *see Jackson v. Widnall*, 99 F.3d 710, 713 (5th Cir. 1996); *Hirras v. Nat'l R.R. Passenger Corp.*, 95 F.3d 396, 399 (5th Cir. 1996). Once such a showing is presented by the moving party, the burden shifts to the non-moving party to demonstrate, by specific facts, that a genuine issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *Texas Manufactured Housing Ass'n, Inc. v. City of Nederland*, 101 F.3d 1095, 1099 (5th cir. 1996); *Brothers v. Klevenhagen*, 28 F.3d 452, 455 (5th Cir. 1994).

All facts are considered in favor of the non-moving party, including all reasonable inferences therefrom. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510; *Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1198 (5th Cir. 1995; *Taylor v. Gregg*, 36 F.3d 453, 455 (5th Cir. 1994; *Matagorda County v. Russell Law*, 19 F.3d 215, 217 (5th Cir. 1994). However, this is so only when there is "an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp.*, 37 F.3d 1068, 1075 (5th cir. 1994); *Guillory v. Domtar Industries, Inc.*, 95 F.3d 1320, 1326 (5th Cir. 1996); *Richter v. Merchants Fast Motor Lines, Inc.*, 83 F.3d 96, 97 (5th Cir. 1996). In the absence of proof, the court does not "assume

that the nonmoving party could or would prove the necessary facts." *Little*, 37 F.3d at 1075 (emphasis omitted); *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888, 110 S.Ct. 3177, 3188, 111 L.Ed.2d 695 (1990).

It is well-settled that "[c]onclusory assertions cannot be used in an affidavit on summary judgment." *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992). Moreover, testimony based on conjecture alone is insufficient to defeat summary judgment. *Lechuga v. Southern Pacific Transportation Co.*, 949 F.2d 790, 798 (5th Cir. 1992). Rule 56(e), Fed.R.Civ.P., also requires that an adversary set forth facts that would be admissible at trial. Material that would be inadmissible cannot be considered on a motion for summary judgment since it would not establish a genuine issue of material fact. *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990). Hearsay is not admissible. A plaintiff must respond to a motion for summary judgment with admissible evidence. *Duplantis v. Shell Offshore, Inc.*, 945 F.2d 187, 191 (5th Cir. 1991).

Plaintiff's complaint broadly alleges that Carlton required black (but not white) employees to perform work for his outside businesses, gave whites authority over the office while he was out, and generally held blacks to a higher standard of work performance. These allegations are strongly denied in affidavits submitted by Carlton, Morlino and four other employees. Plaintiff avers that he worked one day a week on an outside newspaper business owned by the defendant, operating a sales and delivery route. It added no additional hours to his employment, and was done during regular office hours. Although plaintiff says he had no interest or desire in being involved in this paper in any regard and only did so because he was directed to do so by defendant, there is no evidence that this work was involuntary or done under threat of dismissal, or that any other employee, black or white, participated in this activity.

Plaintiff's other allegations that blacks employed in the District Attorney's office were held to higher standards than whites and required to do work whites were not required to do are unsupported by any evidence other than the broad general allegations of Harden.

After a full review of the documents submitted, the court finds no reason to conclude that racial animus on the part of Carlton motivated the termination of Harden. For this reason, the motion for summary judgment will be **granted,** and a separate judgment entered for the defendant.

THIS _____ day of _____, 1998.

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UNITED STATES MAGISTRATE JUDGE